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NYPD Violates USERRA Again

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Q: I am a retired First Sergeant (E-8) in the Army Reserve, and I joined ROA recently, after you amended your constitution to expand membership eligibility to include noncommissioned officers. I am a police officer in the New York Police Department (NYPD) and an elected officer of the New York City Police Benevolent Association (NYCPBA).

I read with great interest your Law Review 13090[1] (July 2013) about the lawsuit initiated by the United States Department of Justice (DOJ) against the NYPD and the pension plan, under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Under USERRA, a person who leaves a job for service and returns to the same employer after service and who meets the USERRA eligibility criteria[2] must be treated for pension purposes *as if he or she had been continuously employed by the civilian employer during the time that the person was away from work for service.*

When an NYPD officer retires, his or her NYPD pension is computed based on a formula that includes his or her NYPD compensation during the final year of NYPD employment, or in some cases based on the person's highest three years of NYPD compensation. When an NYPD officer left his or her job for military service near the end of his or her NYPD career, NYPD

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[1] We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 955 articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and an additional 133 so far in 2013.

[2] The person must have left the job for the purpose of service and must have given the employer prior oral or written notice. The person's cumulative period or periods of service, relating to that employer relationship, must not have exceeded five years, and there are nine exemptions—kinds of service that do not count toward the five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge, and after release the person must have made a timely application for reemployment. Please see Law Review 1281 for a primer on the USERRA eligibility criteria and Law Review 201 for a detailed summary of USERRA's five-year limit.

gave the officer credit, for NYPD retirement purposes, only for the *base pay* that he or she would have received from the NYPD during that period of service.

In the lawsuit, DOJ contended, and the NYPD finally agreed, that the police officer's imputed pay for the time that he or she was away from work for service must also include the overtime pay and night differential pay that the individual would have received if continuously employed. The NYCPBA and its members are very pleased with the DOJ representation and with the remedy that DOJ obtained for serving and recently retired NYPD officers whose NYPD careers were interrupted by military service.[3]

I am writing now because the NYCPBA has become aware of another way that the NYPD is shortchanging police officers who also serve in the Reserve Components[4] (RC) of the armed forces. I am thinking about a particular police officer who is a member of our union—let's call him Joe Smith.

Before Joe became a police officer in 2007, he served on active duty in the Marine Corps for five years, from February 2002 until February 2007, and he served in combat in Iraq. After he left active duty, he joined the NYPD as a rookie police officer in July 2007. Under a New York state law, a police officer who has active military service that includes combat duty *before* starting the police career is permitted to purchase up to three years of police department pension credit for the pre-police military service, *after* the police officer has five years of service on the police department.

After leaving active duty in early 2007, Joe affiliated with the Marine Corps Reserve (USMCR), and he has actively participated in the USMCR ever since, despite considerable resistance and harassment from his NYPD supervisors. In July 2012, when he had five years of NYPD service, Joe purchased three years of NYPD pension credit for his active military duty prior to 2007, as permitted by state law.

In September 2012, Joe was recalled to active duty for a year and deployed to Afghanistan. Joe was released from active duty in September 2013, and he promptly applied for reemployment with the NYPD. Joe met the USERRA eligibility criteria, in that he gave prior notice to the NYPD and did not exceed the five-year limit.[5] Joe served honorably and did not receive a disqualifying bad discharge—he has not been discharged, only released from active duty.

Joe returned to work for the NYPD in early October 2013 and he applied for NYPD pension credit for his recent year of active duty. The personnel department and legal department

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[3] As is explained in Law Review 13090, the DOJ settlement with New York City also requires the city to provide the same remedy with respect to all city pension plans, not just the plan for police officers.

[4] The Reserve Components are the Army Reserve, Army National Guard, Air Force Reserve, Air National Guard, Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve.

[5] Since this was an involuntary call-up, it does not count toward his five-year limit.

have told him that state law only provides for three years of NYPD pension credit for military service, and he has already received the three years. What do you think?

A: I think that the NYPD and its pension plan have clearly violated USERRA. The state law is essentially irrelevant with respect to Joe getting NYPD pension credit for his recent year of active duty. Because Joe meets the USERRA eligibility criteria, the employer and the pension plan *must* treat him as if he had been continuously employed during the one-year period that he was away from work for service, from September 2012 to September 2013. The pertinent USERRA section is as follows:

"(a)
(1)
(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.
(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.
(2)
(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.
(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.
(b)
(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or
(B) if the sponsor does not provide—
(i) to the last employer employing the person before the period served by the person in the uniformed services, or
(ii) if such last employer is no longer functional, to the plan.
(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.
(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—
(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or
(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).
(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan."

Title 38, United States Code, section 4318 (38 U.S.C. 4318).

Section 4302 explains the relationship between USERRA and state laws and other matters:

"(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."

38 U.S.C. 4302.

Under this section, USERRA is *a floor and not a ceiling* on the rights of people like Joe. USERRA does not require the NYPD to give Joe the opportunity to purchase pension credit for his active duty that preceded the start of his NYPD career in 2007. State law gives Joe that right. This is an example of a state law that gives Joe *greater or additional rights* and is not preempted by USERRA, in accordance with section 4302(a).

Section 4331 of USERRA, 38 U.S.C. 4331, gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. DOL published proposed regulations in the *Federal Register* September 20, 2004. After considering comments received and making a few adjustments, the Department of Labor (DOL) published in the December 29, 2005, *Federal Register* the final USERRA regulations. They took effect January 18, 2006. The regulations are published in Title 20, Code of Federal Regulations (CFR), Part 1002 (20 C.F.R. Part 1002). One section of the DOL regulations explains the relationship between USERRA and other laws, contracts, agreements, policies, and other matters:

How does USERRA relate to other laws, public and private contracts, and employer practices?

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.
(b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.
(c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.
(d) *If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA.* For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave."

20 C.F.R. 1002.7 (emphasis by italics supplied, bold question in original).

The fact that the NYPD has gone above the federal floor in one area (by permitting Joe to purchase credit for three years of pre-employment military service) in no way justifies the NYPD going below the federal floor in another area (by refusing to credit Joe's recent one-year period of active duty).

Under Article VI, Clause 2 of the United States Constitution (commonly called the "Supremacy Clause"), federal law trumps conflicting state law. That clause reads as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[6]

Q: The personnel office says that Joe is "double dipping" by getting NYPD pension credit and federal military retirement credit for this most recent year of active duty (September 2012 to September 2013) and that such double-dipping is not allowed. What do you say about that?

A: First, it is by no means certain that Joe will ever qualify for the RC retirement at age 60 (what I am now enjoying, as a retiree of the Navy Reserve who turned 60 in May 2011). To qualify for the RC retirement, Joe must have at least 20 "good years"—years in which he has earned at least 50 RC retirement points each year.[7] At this point, Joe has earned ten or eleven good years, since he enlisted in 2002. It is entirely possible that because of injury, illness, a large military drawdown, or other reasons Joe will not make it to the 20 good year point and will not qualify for the RC retirement benefits at age 60.

Moreover, federal law explicitly *permits* this sort of double-dipping and overrides state laws and local ordinances that forbid it:

"No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay under this chapter may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, under any other law, on account of civilian employment by the United States or otherwise, or in determining the amount payable under that law, if that service is otherwise properly credited under it."

10 U.S.C. 12736.

The wording of section 12736 has not changed since it was enacted as part of the Reserve Retirement Law (Public Law 810 of the 80th Congress). Here at ROA headquarters, we have the pen that President Truman used to sign that law. That law is one of the foundations of the

[6] Yes, it is capitalized just that way, in the style of the late 18th Century.
[7] *See* 10 U.S.C. 12731(a)(2).

modern Total Force Policy. Without the incentive of the age-60 retirement benefit, it would not be possible to recruit Reserve component personnel and retain them for two decades or more.

Section 12736 does not require a state to allow public employees to purchase credit for military service that predates their public employment. Section 12736 simply means that if a state permits public employees generally to purchase such credit, it cannot deny that privilege to public employees who are using the same period of military service to help them qualify for Reserve (age 60) retirement. In other words, section 12736 is an 'anti-anti-double dipping' provision. Section 12736 invalidates and overrides a state “thou shalt not double-dip” law. *See Cantwell v. County of San Mateo,* 631 F.2d 631 (9th Cir.), *cert. denied,* 450 U.S. 998 (1980).

Thank you for bringing this situation to my attention. I have brought this issue and this article to the attention of appropriate people at DOL and DOJ. We will keep the readers informed of new developments concerning this important matter.